No. 75-1676

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS C. BOSCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged in two separate indictments returned the same day in the United States District Court for the Western District of Pennsylvania. The first (Pet. App. E 25-31, the 75-3 indictment) charged that petitioner and others[1] had conspired to use the mails to defraud the Ohio Casualty Insurance Company and the St. Paul Mercury Insurance Company through the staging of three fake automobile accidents on April 12, August 15, and December 26, 1973. The second (Pet. App. E 20-24, the 75-4 indictment) charged petitioner and another group

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[1]The other co-conspirators named were Casey Babuscio, Thomas Warren Henning, Roy F. Norris, Jr., Thomas Robert Gallo, David Tompkins, John V. Sabatini, Joseph L. Bisceglia, M.D., Michael F. DeRosa, D.D.S., and Leonard E. Sweeney.

of conspirators[2] with conspiring to use the mails to defraud the former company through the staging of a fake automobile accident on September 17, 1972. Petitioner was tried first and convicted on the 75-4 indictment.[3] The government then sought to bring to trial the 75-3 indictment.

Petitioner moved to dismiss the prosecution, alleging that the conspiracy charged in the 75-3 indictment was part of the conspiracy charged in the first trial (the 75-4 indictment) and that the second prosecution would violate the Double Jeopardy Clause.[4] The district court in a thorough opinion denied the motion (Pet. App. A 6-14). On an interlocutory appeal, the court of appeals affirmed without opinion (Pet. App. B 15-17).

1. For the reasons stated in our response to the petition for a writ of certiorari in *Abney* v. *United States*, No. 75-6521, certiorari granted, June 14, 1976, and our memoranda in *Barket* v. *United States*, No. 75-1280, the court of appeals incorrectly assumed jurisdiction over the interlocutory appeal. But, for the reasons given in our supplemental memorandum in *Barket*,[5] there is no reason to hold this case pending decision in *Abney*. For however this Court decides the jurisdictional question in *Abney*, the trial of this case should proceed, since the court of appeals properly rejected petitioner's double jeopardy claim on the merits.

[2]These co-conspirators were Louis A. DeSantis, Renaldo DiGiosio, Mark Houmis, Barbara Ross, Elias I. Yurick, Candice McCambridge, and Paul Scolieri. Mary Jane Hanula was named as an unindicted co-conspirator.

[3]At this trial, DeSantis, DiGiosio, Yurick and McCambridge were also found guilty of conspiracy and three substantive mailing counts. The charges against Scolieri were dismissed at the conclusion of the prosecution's case and Houmis and Ross were convicted in a later trial.

[4]Petitioner's case was severed from that of his co-conspirators. In a separate trial, Henning was convicted of conspiracy and two substantive mail fraud counts and Sweeney was convicted on three substantive counts. Babuscio, Norris, Gallo, Sabatini, Bisceglia, and DeRosa pleaded guilty and Tompkins is a fugitive.

2. The district court correctly concluded that "[w]hile the two indictments here in question allege commission of the same type of crime, *i.e.*, conspiracy and violation of the Mail Fraud Statute, the offenses charged are not factually the same" (Pet. App. A 11). As the opinion of the district court details, the 75-4 indictment charged, and the evidence at petitioner's trial showed, that petitioner and a group of co-conspirators arranged a fake automobile accident and claim for Mary Jane Hanula on September 17, 1972. In the 75-3 indictment, petitioner with "an almost totally 'new cast'" (Pet. App. A 9), was charged with arranging three other accidents at different times. The two indictments thus charged separate conspiracies.

Contrary to petitioner's contention (Pet. 3-4), *Braverman* v. *United States*, 317 U.S. 49, does not bar his prosecution under the 75-3 indictment. In *Braverman*, the defendants were indicted for and convicted of seven conspiracies to violate different provisions of the internal revenue laws. At trial, however, the government conceded that there was only a single conspiracy to commit the seven different illegal acts (317 U.S. at 51). This Court reversed the multiple convictions and remanded for resentencing on the grounds that "[w]hether the object of a single agreement is to commit one or many crimes, it is in

[5]We are supplying a copy of that memorandum to petitioner.

either case that agreement which constitutes the conspiracy which the statute punishes" (*id.* at 53) and that "[t]he single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute * * *" (*id.* at 54).

In the present case, in contrast, the two indictments charged different conspiracies, involving separate groups at different times, both relating to defrauding insurance companies through a similar method. The differences between the conspiracy for which petitioner was convicted in indictment 75-4 and that with which he is charged in indictment 75-3 are sufficiently separate to justify petitioner's trial under the latter indictment despite his previous conviction under the former. See, *United States* v. *Hodges*, 502 F. 2d 586 (C.A. 5); *United States* v. *Prince*, 515 F. 2d 564 (C.A. 5).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[6]The lower court cases petitioner cites (Pet. 4) are inapposite. In *United States* v. *Tanner*, 471 F. 2d 128, 141 (C.A. 7), the government admitted that a conspiracy charged in a prior indictment had constituted a "sub-agreement" of the broader conspiracy charged in that case. In *United States* v. *O'Dell*, 462 F. 2d 224, 226, n. 2 (C.A. 6), a double jeopardy claim was rejected because, as here, the defendant's co-conspirators had been different. *United States* v. *Cohen*, 197 F. 2d 26, 29 (C.A. 3), involved a second conspiracy charge with the same overt acts as a first charge. Finally, in *United States* v. *Mallah*, 503 F. 2d 971, 986-987 (C.A. 2), the court sustained a double jeopardy claim because there was a significant overlapping of parties.